

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE SOBCZAK,

Plaintiff-Appellant,

v

ROGER KALINIAK,

Defendant-Appellee.

UNPUBLISHED

November 13, 1998

No. 203484

Kent Circuit Court

LC No. 96-003123 NO

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendant summary disposition of plaintiff's claims for malicious prosecution, intentional infliction of emotional distress, and violation of her civil rights pursuant to 42 USC 1983. We affirm.

I

Plaintiff claims that defendant fabricated evidence to generate probable cause for an arrest warrant. Police had suspected plaintiff's sons of maliciously destroying property. When defendant, then a detective with the Walker city police department, interviewed plaintiff about the incident, she said she was having breakfast with one of her sons and his girlfriend at the time the crime occurred. Defendant maintains that plaintiff later recanted her statement, after he told her of his plan to interview the girlfriend. He submitted that information in his report to the prosecutor's office. An assistant prosecutor then issued a warrant charging plaintiff with accessory after the fact, a common-law crime punishable under MCL 750.505; MSA 28.773. Plaintiff contends that she never recanted the alibi and maintains that she did have breakfast with her son and his girlfriend. All charges were eventually dismissed against plaintiff and her sons.

In addition to defendant's claim that plaintiff recanted her statement, his police report includes an interview with an eyewitness who stated that he saw plaintiff's sons at the scene when the crime occurred and an interview with the son's girlfriend, in which she denied going to breakfast with plaintiff. The record and the trial court's written opinion evince concern that defendant might have badgered the girlfriend into contradicting plaintiff's statement. Because we make all legitimate inferences in favor of

the nonmoving party when reviewing a grant of summary disposition, we will assume that the girlfriend's statement was coerced and unreliable. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Both parties agree that resolution of all three claims – malicious prosecution, intentional infliction of emotional distress, and the claim under 42 USC 1983 – hinge on whether there was probable cause to issue plaintiff's arrest warrant. Plaintiff argues that without the claim in defendant's report that she recanted her statement, there was no probable cause.¹ Defendant argues that probable cause existed even without the questionable portion of the report.

We agree with the trial court's analysis that the warrant was supported by probable cause. The existence of probable cause is a question of law, and it is therefore properly determined by the trial court. *Matthews v BCBSM*, 456 Mich 365, 381; 572 NW2d 603 (1998). As a question of law, it is reviewed de novo on appeal. *Id.* at 377. Probable cause is measured by an objective standard. *Id.* at 387. That is, "there must be such reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged." *Id.* at 388, quoting *Wilson v Bowen*, 64 Mich 133, 138; 31 NW 81 (1887). As the trial court noted, an accessory after the fact is "one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment." *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978), quoting Perkins, Criminal Law (2d ed), p 667.

Considering only that plaintiff's testimony contradicted eyewitness accounts and that plaintiff knew she was giving her statement as part of a criminal investigation of her sons' activities, there were reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves, to warrant an ordinarily cautious person in the belief that plaintiff was guilty of accessory after the fact.

II

Because there was probable cause to believe plaintiff was an accessory after the fact, her state tort claims must fail. Plaintiff's malicious prosecution claim must fail, because absence of probable cause is an essential element of the claim. *Payton v Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995). Regarding plaintiff's claim for intentional infliction of emotional distress, we note that such claims are barred where one merely insists on one's legal rights in a permissible way. *Cebulski v Belleville*, 156 Mich App 190, 196; 401 NW2d 616 (1986). Our determination that there was probable cause in turn requires the conclusion that, in seeking the arrest warrant, defendant simply sought to exercise his legal right in a permissible way, i.e., presenting his police report to a prosecutor with a request for an arrest warrant.

III

Although plaintiff does not state precisely which constitutional rights defendant allegedly violated, federal courts have consistently held that probable cause bars a §1983 complaint for wrongful arrest. *Stemler v City of Florence*, 126 F3d 856, 871 (CA 6, 1997); *Schertz v Waupacka Co*, 875 F2d 578, 582 (CA 7, 1989).

The trial court properly granted summary disposition.

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

¹ In support of her argument that there was no probable cause to issue the warrant, plaintiff states in her brief that “two Assistant Kent County Prosecutors believed that there was no probable cause with which to charge [plaintiff].” After reviewing the depositions of the two assistant prosecutors in question, we find that plaintiff’s brief misrepresents their testimony. While both prosecutors expressed some reservation about bringing these particular charges against this plaintiff, they both expressly stated that they would not question the judgment of their colleague who issued the warrant.